BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

AIMAN ABDELGABAR	)	
Claimant	)	
	)	
VS.	)	
	)	
GREAT PLAINS MANUFACTURING, INC.	)	
Respondent	)	Docket No. 1,060,014
	)	
AND	)	
	)	
SENTRY INS. A MUTUAL COMPANY	)	
Insurance Carrier	)	

ORDER

STATEMENT OF THE CASE

Claimant requested review of the June 7, 2012, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore. Tamara J. Collins, of Wichita, Kansas, appeared for claimant. Michael D. Streit, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) found that claimant failed to sustain his burden of proof that he gave respondent timely notice of his injury by repetitive trauma. Accordingly, workers compensation benefits were denied.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the June 7, 2012, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant requests review of the ALJ's finding that he did not provide respondent with timely notice of his repetitive trauma injury. Claimant asks the Board to reverse the ALJ's Order denying him workers compensation benefits.

Respondent argues that claimant did not give proper notice of his repetitive trauma injury and, therefore, the ALJ's Order denying benefits should be affirmed.

The issue for the Board's review is: Did claimant provide respondent with timely notice of his repetitive trauma injury?

FINDINGS OF FACT

Claimant began working for respondent through an employment agency but was hired full time as of December 6, 2010, as a paint line loader. He described his job as putting hooks on a chain and then hanging parts onto the hooks. The parts then go through a paint line. The parts can range in size and weight from very tiny to big. Some parts can weigh between 75 and 100 pounds. He was allowed to ask for help if an item was heavy and would have been required to ask for help if an item weighed too much. The line keeps moving, and he had to work fast. He performed this job repetitively all day, 10 hours a day, 4 or 5 days a week.

Claimant said he would lift from 4,000 to 5,000 parts a day and was working fast, and therefore it would be hard to tell when he was hurt or which part he would have been hurt lifting. Claimant said he has pain in his mid back. He said January 30, 2012, was the day he felt the maximum amount of pain. He was working the line and felt pain that morning. When he went home, he was sore, but when he woke up the next morning he had a hard time getting out of bed. He called his supervisor, Tyrone Redmond, and told him he had hurt his back and could not go to work. He did not tell Mr. Redmond that he had been hurt at work. Claimant took six days off work because of his back. He returned to work on February 6, 2012.[1]

When claimant returned to work, he explained to Mr. Redmond that his injury occurred at work, but Mr. Redmond said he did not think it did because claimant had not mentioned a work injury when he called in to take off work. Mr. Redmond then took claimant to the human resources office. Tammy Rhea-Bosco was present at the human resources office. Claimant said he again reported that his back was hurting, the back injury was work related, and that he needed medical treatment. Mr. Redmond and Ms. Rhea-Bosco then asked claimant numerous questions, after which Ms. Rhea-Bosco stated she was not going to accept his claim as a work-related injury because he had not reported it immediately. Ms. Rhea-Bosco refused to send claimant to a workers compensation physician.

Claimant testified that after Ms. Rhea-Bosco told him she would not send him to a workers compensation doctor, she said he would be free to seek medical attention at his own expense. She also said that she should make him get a note from a doctor to return to work, but neither she nor Mr. Redmond followed up on that, and they sent him back to work. Claimant continued to work, although he was still experiencing back pain.

[1] Mr. Redmond testified that claimant returned to work on February 7, 2012.

Claimant said he did not speak to Mr. Redmond and Ms. Rhea-Bosco about his back problems after he was told they would not send him to a doctor.

Claimant testified that his last day of work was February 20, 2012. He said he came in to work on that day and spent some time in the human resources office. He could not remember if he clocked in. Claimant was then told he was being terminated because of excessive absenteeism. Claimant had a history of problems with absenteeism and as early as March 21, 2011, he was written up for having attendance and absenteeism problems. Employee performance reviews dated September 22, 2011, and February 9, 2012, dealt with absenteeism problems. Claimant received warnings on June 6, 2011, August 29, 2011, and October 13, 2011, concerning his absenteeism. On February 20, 2012, claimant received his fourth warning concerning absenteeism, and claimant was terminated. After his termination, on February 28, 2012, claimant became employed as a security officer at another business.

Claimant said the first time he received treatment for his back was March 12, 2012, when he went to Salina Regional Health Center.

Tyrone Redmond is the paint line supervisor at respondent, and he was claimant's immediate supervisor. Mr. Redmond said the first time he spoke to claimant about any injuries or problems with his back was on February 7, 2012. Before that date, claimant had left messages on his answering machine at work saying he was having issues with his back. Mr. Redmond said claimant returned to work on February 7, 2012. Mr. Redmond asked claimant to furnish him with a doctor's note, as per company policy, since he had been away from work for more than three consecutive days. Claimant responded that he did not have a doctor's note. Mr. Redmond testified he then asked claimant about his back problems, whether they were from work or from home. He said claimant told him he was not sure but did not think it was work-related. Claimant did not ask to see a doctor and said he was fine. Since claimant did not have a note from a doctor, Mr. Redmond and claimant went to Tom Slesher's office and discussed it with him. They then sent claimant back to work. Later, Redmond and claimant went to Tammy Rhea-Bosco's office in human resources. Mr. Redmond said:

> A. [by Mr. Redmond] The only thing we discussed [with Ms. Rhea-Bosco] was him not turning in his–giving his supposed injury, and there was never any indication that he had actually hurt hisself [*sic*] in work.
>
> Q. [by claimant's attorney] I'm sorry, what did you just say?
>
> A. There was no indication that he had hurt himself at work. But, yes, we did discuss the matter.
>
> Q. Did he, at that time, tell [Ms. Rhea-Bosco] that his back was hurting because of the job?
>
> A. No.
>
> Q. Do you remember what he said to her?
>
> A. He just said that he didn't know for sure if he had hurt it at work or not. And she asked him, was there anything that you could say specifically about your

> injury and if you had an injury at work, he said, no, he couldn't pinpoint an accident that happened.[2]

Claimant was told to return to the line and continue working. Mr. Redmond said after February 7, he asked claimant a couple of times if his back was doing okay, and claimant's response was that he was fine.

Mr. Redmond testified that on February 20, 2012, as claimant was clocking in, he told claimant he needed to talk with human resources about a no-call, no-show absence the Friday before. Claimant did not work on the line at all on February 20.

The ALJ asked Mr. Redmond more about the conversation with claimant on February 7, 2012:

> Q. [by the Court] Was there a discussion with Mr. Abdelgabar on February 7th about whether his back problems could be work-related?
>
> A. [by Mr. Redmond] Yes.
>
> Q. So he raised the possibility that it could be work-related, and he was asked if there's any specific incident that he could point to as the cause to his back problem?
>
> A. Yes.
>
> Q. And he couldn't identify a specific incident, and for that reason the claim was denied?
>
> A. I assume.
>
> Q. Okay. What do you recall him saying about what might have been the work-related nature of his back pain?
>
> A. He never specified.
>
> Q. Okay. But you know he does a lot of the bending, lifting, and twisting in his job?
>
> A. Yes.
>
> Q. And when he thought it might be work-related, that didn't ring any bells with you, that it could be from repetitive bending, twisting, lifting?
>
> A. At the point, no. At that point, no.[3]

Tammy Rhea-Bosco testified that she is employed by respondent as the benefits manager. She works in human resources on the medical side. She became involved with claimant on February 7, 2012, because it is respondent's policy if an employee misses three consecutive days from work, the employee needs to provide respondent with a doctor's note. Claimant did not have a doctor's note. He said he never got any treatment, did not want any treatment, and that he was fine. Ms. Rhea-Bosco testified she asked claimant how he thought he hurt himself, and claimant answered he did not know. Ms.

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[2] P.H. Trans. at 56-57.

[3] P.H. Trans. at 58-59.

Rhea-Bosco asked if he had been hurt at work or home, and claimant answered he was not sure one way or the other. She asked claimant if he wanted treatment, and he said no. She asked him if he had a specific incident at work, and claimant answered he could not think of anything. Ms. Rhea-Bosco then decided to allow claimant to return to work without a doctor's note. Ms. Rhea-Bosco said she did not hear about any other issues with claimant until respondent received a letter from claimant's attorney on or about March 12 or 13.

Ms. Rhea-Bosco denied telling claimant his workers compensation claim was denied because he did not report his accident immediately.

PRINCIPLES OF LAW

K.S.A. 2011 Supp. 44-501b states in part:

> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
>
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(e) states:

> ''Repetitive trauma'' refers to cases where an injury occurs as a result of repetitive use, cumulative traumas or microtraumas. The repetitive nature of the injury must be demonstrated by diagnostic or clinical tests. The repetitive trauma must be the prevailing factor in causing the injury. ''Repetitive trauma'' shall in no case be construed to include occupational disease, as defined in K.S.A. 44-5a01, and amendments thereto.
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> In the case of injury by repetitive trauma, the date of injury shall be the earliest of:
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> (1) The date the employee, while employed for the employer against whom benefits are sought, is taken off work by a physician due to the diagnosed repetitive trauma;
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> (2) the date the employee, while employed for the employer against whom benefits are sought, is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma;
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> (3) the date the employee, while employed for the employer against whom benefits are sought, is advised by a physician that the condition is work-related; or
>
> (4) the last day worked, if the employee no longer works for the employer against whom benefits are sought.
>
> In no case shall the date of accident be later than the last date worked.

K.S.A. 2011 Supp. 44-520 states:

> (a)(1) Proceedings for compensation under the workers compensation act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer by the earliest of the following dates:
>
> (A) 30 calendar days from the date of accident or the date of injury by repetitive trauma;
>
> (B) if the employee is working for the employer against whom benefits are being sought and such employee seeks medical treatment for any injury by accident or repetitive trauma, 20 calendar days from the date such medical treatment is sought; or
>
> (C) if the employee no longer works for the employer against whom benefits are being sought, 20 calendar days after the employee's last day of actual work for the employer.
>
> Notice may be given orally or in writing.
>
> (2) Where notice is provided orally, if the employer has designated an individual or department to whom notice must be given and such designation has been communicated in writing to the employee, notice to any other individual or department shall be insufficient under this section. If the employer has not designated an individual or department to whom notice must be given, notice must be provided to a supervisor or manager.
>
> (3) Where notice is provided in writing, notice must be sent to a supervisor or manager at the employee's principal location of employment. The burden shall be on the employee to prove that such notice was actually received by the employer.
>
> (4) The notice, whether provided orally or in writing, shall include the time, date, place, person injured and particulars of such injury. It must be apparent from the content of the notice that the employee is claiming benefits under the workers compensation act or has suffered a work-related injury.
>
> (b) The notice required by subsection (a) shall be waived if the employee proves that (1) the employer or the employer's duly authorized agent had actual knowledge of the injury; (2) the employer or the employer's duly authorized agent was unavailable to receive such notice within the applicable period as provided in paragraph (1) of subsection (a); or (3) the employee was physically unable to give such notice.
>
> (c) For the purposes of calculating the notice period proscribed in subsection (a), weekends shall be included.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[4] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted

[4] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[5]

ANALYSIS

The sole issue for this review is notice. Claimant alleges injury by a series of traumas.[6] At the beginning of the preliminary hearing, Judge Moore announced that claimant was claiming a "series of accidents [*sic*] through repetitive bending and lifting, with a date of accident of February 20, 2012."[7] The current notice statute, K.S.A. 2011 Supp. 44-520, differentiates between "accidents," which result from a single trauma, and "injury by repetitive trauma." If claimant is alleging injury by repetitive traumas, there is no date of "accident." Claimant contends that for purposes of determining whether notice was timely given, the last day worked controls because he is alleging a repetitive trauma injury. Respondent agrees that claimant would have 20 calendar days from the last day he actually worked for respondent but contends that was on February 15, 2012, not February 20, 2012. Although claimant was at work when he was terminated on February 20, 2012, respondent argues that claimant did not actually work on that date. Claimant does not recall if he had started his job duties before being called to the office and told he was being terminated for excessive absenteeism. Nevertheless, claimant argues that since he was at work on February 20, 2012, when he was terminated, that is his last day worked for purposes of the notice statute. Regardless, claimant's written notice, which was received by respondent no earlier than March 12 or March 13, 2012, was not received within 20 calendar days of either February 15, 2012, or February 20, 2012.[8] Judge Moore found claimant failed to give timely notice. Implicit in this finding is a determination that claimant did not expressly relate his back problem to his work during the meeting on February 7, 2012.

Judge Moore found that claimant's back injury was caused by his work and that it resulted from repetitive trauma arising out of and in the course of his employment with respondent. Claimant was asked by respondent's human resources benefits manager if he could pinpoint a specific incident or accident at work. Claimant said he could not. It is not uncommon for injured workers, as well as employers, to misunderstand the nature of repetitive trauma injuries and their relationship to workers compensation insurance. This

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[5] K.S.A. 2011 Supp. 44-555c(k).

[6] Claimant's Application for Hearing filed with the Division of Workers Compensation on March 12, 2012, alleged a specific date of accident of February 7, 2012. Claimant filed an Amended Application for Hearing on June 1, 2012, that alleged either a date of accident on or a series through "02/20/12 last day worked."

[7] P.H. Trans. at 4.

[8] 2012 was a leap year, so February 2012 had 29 days.

can make giving timely notice problematic. It is also problematic to give "the time, date, place . . . and particulars" of a repetitive trauma injury. Nevertheless, that is what the law requires.

Claimant also argues that respondent had "actual notice" of his back injury and, therefore, the notice requirement was waived. Claimant alleges on February 7, 2012, he reported to respondent that his back injury was work related. This is not actual notice, but it would be notice. Moreover, it would be timely notice for a series of traumas ending on a day subsequent to February 7, 2012, whether that was February 15 or February 20, 2012. Claimant testified that on February 7, 2012, he unequivocally told his supervisor and respondent's human resources benefits manager that his back injury was work related. Mr. Redmond and Ms. Rhea-Bosco denied this. Although there is conflicting evidence on this point, this Board Member finds that claimant did not give notice to respondent. Claimant told respondent his back was injured but said he may or may not have injured it at work. He raised the possibility that it could be work related, but this is not sufficient to constitute notice of either a work-related accident or a work-related repetitive trauma. The fact that claimant could not point to any specific incident as the cause of his back problem does not defeat his claim for a repetitive trauma injury. But the fact that he could not say and did not allege that his back injury was caused by his work does render his purported notice deficient and ineffective.

CONCLUSION

Claimant failed to meet his burden of proving he gave respondent timely notice of his alleged repetitive trauma injury.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated June 7, 2012, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July, 2012.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge